APPENDIX

Appendix A. Selective Service Regulation.

Selective Service System Regulation §1622.20 (32 C. F. R. 1622.20):

"1622.20 Class IV-E: Conscientious Objector Opposed to Both Combatant and Noncombatant Training and Service. (a) In Class IV-E shall be placed any registrant who, by reason of religious training and belief, is found to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

(b) Section 6 (j) of title I of the Selective Service Act of 1948 provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

[This section was superseded on 28 September 1952 by §1622.14, below.]

Selective Service System Regulation §1622.14 (32 C. F. R. 1622.14):

"1622.14 Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest. (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be

conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code."

Selective Service System Regulation §1622.11 (32 C. F. R. 1622.11):

"1622.11 Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only. (a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces."

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

Selective Service System Regulation §1660.1 (32 C. F. R. 1660.1):

"1660.1 Definition of Appropriate Civilian Work.—(a) The types of employment which may be considered under the provisions of section 6(j) of title I of the Universal Military Training and

Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

(1) Employment by the United States Government, or by a State, Territory, or possession of the United States, or by a political subdivision thereof, or by the District of Columbia.

(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

(b) Except as provided in subparagraph (2) of the paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

[Effective 4 March 1952.]

Appendix B. Affidavits Supporting Argument VI.

Affidavit of T. F. Thomasson

I read a letter from Brother Nelson Nichols in which it was stated that the F.B.I. man, who investigated Brother Ted Head, said that I said the Church of Christ, here where I worship, did not oppose taking part in non-combative service in carnal war. That certainly is a mistake. He asked me whether I would be willing to minister to the sick and wounded in hospitals. I told him I would, but I did not mean that I would join the army to do so; and that is the mistake. I just overlooked telling him that.

Now, the local Church of Christ, meeting at Bently Street and Tim Bell Road in Waterford, California, where I worship, stands opposed to taking part in carnal war in any form, and we stand as a unit on that.

Our reason is that we are trying to follow Christ. He is our example, and he said, "Thou shalt not kill." When he was reviled he reviled *not* again. (I Peter 2:23) He said, "—they that take the sword shall perish with the sword." (also Rev. 13:10) (Matthew 26:52) He commanded the apostle Peter to put up his sword. The apostle Paul, said, "We wrestle not against flesh and blood," (Ephesians 6:12) and "the weapons of our warfare are *not carnal.*" (II Corinthians 10:4)

There are many statements in the Bible that condemn war, therefore, we cannot, as believers, conscientiously take part in carnal warfare. Ted learned these

things from the church here. He obeyed the Gospel here and was a member of this church. In all the teachings and preaching he heard here, these things were included. We believe he is conscientious in the matter.

Just before he ascended back to his father, Christ instituted his supper. (Matthew 26:30; Mark 14:22-24; Luke 22:16-20) And his disciples came together on the first day of the week to do this. (Acts 20:7) Paul said, "Forsake not the assembly." (Hebrews 10:25) They assembled on the first day of the week. (Acts 20:7) To be in the army would hinder one from doing this command.

Again, we are forbidden to be unequally yoked together with unbelievers. (II Corinthians 6:14)

Christ is the prince of peace. (Matthew 2:14). Christ came to bring peace, hence to follow him, one must follow that that makes for peace. He said, "Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: *but I say unto you, That ye sist not evil:* but whosoever shall smite thee on thy right cheek, turn to him the other also. And if any man will sue thee at the law, and take away thy coat, let him have thy cloak also." These are Christ's sayings in his wonderful sermon on the mount. (Matthew 5:38-41).

These, together with many other statements in the New Testament, constitute the reasons why we oppose taking part in carnal war. I have been a minister for

more than fifty years, studying always, and searching the word of God for the full meaning and intent of scriptures necessary to the saving of souls. In all my study, and work with other preaching brethren, I have found no sanction to engaging in carnal warfare, only to the contrary.

November 10, 1952

T. F. THOMASSON
361 B Street
Box 181
Waterford, California

STATE OF CALIFORNIA,

County of Fresno.—ss.

On this 10th day of November, 1952, before me, the undersigned, a Notary Public in and for said County, personally appeared

MR. T. F. THOMASSON

known to me to be the person whose name subscribed to the within instrument and acknowledged that he executed the same.

Witness my hand and official seal.

D. E. PAULL
Notary Public in and for said County and State.

My Commission Expires Feb. 18, 1956.

Affidavit of C. Nelson Nichols

Greenville, S. C.
November 12, 1952

TO WHOM IT MAY CONCERN:

As a member and minister of the Church of Christ I want all to know our position regarding participation in carnal warfare and/or taking part in an armed force.

From my youth up I have been associated with the Church of Christ, known to the Federal Bureau of Investigation as the "peace Churches of Christ." I have been active in church work for eleven years and have been a minister for seven and one-half (7½) years.

This is not a new belief with these Churches of Christ. For many years the Church of Christ has been rooted in the faith that a Christian must not kill or even participate in an armed force of any kind. This was firmly proven and established in this country more than a century ago, and published nationally in 1848 (See A. Campbell's "Address on War" and also, Congressional Record, May 7, 1952). This has also been brought to light often in publications during peace-times and by the stand of our young men in each war since 1848 as well as before.

Our faith is based on New Testament Scriptures which teach Christians not to use force OR TO BE A PART OF AN ARMED FORCE, some of which scriptures follow: "Do violence to no man" (Luke 3:14); "Thou shalt not kill" (Matt. 5:21; Rom. 13:9); "We

ought to obey God rather than men" (Acts 5:29); "Be ye not unequally yoked together with unbelievers" (2 Cor. 6:14); and Christ said, "My kingdom is not of this world: if my kingdom were of this world, then would my servants fight" (John 18:36). Furthermore, we believe that Christ forbid us to take an oath when he said, "Swear not at all, neither by heaven . . . ; Nor by earth . . . Let your communication be yea" (yes) or "nay" (no) (Matt. 5:34, 35, 37); therefore we affirm a thing to be true to our knowledge.

In 1951 I wrote a letter to each of the Churches of Christ in this fellowship, asking each male member of this faith to attest to that fact by signing a form letter stating (besides other things too lengthy to mention here) as follows:

"This is to certify that we Churches of Christ are conscientiously opposed to participation in war in any form. Our belief in the Supreme Being involves duties superior to those arising from any human relation. . . . The basis of this faith is found in a multitude of Holy Scriptures, . . .

"Our position on this vital subject has been set forth many times across the Nation. . . .

"We do not know of an active minister in these Churches of Christ who does not oppose Christians' participating in carnal warfare. These Churches of Christ are not to be confused with many which wear the same name; we constitute a distinct fellowship.

"We submit this that all may know our position relative to our opposing participation in carnal warfare, and that we might be recognized as a distinct group or fellowship which now is and in the past has been, 'a peace church,' to use modern terminology."

These congregations (200 and some in number, scattered across the United States, England, and in British Central Africa), agreed to have the matter published before the officials of this land to firmly establish these facts in their minds. On May 7, 1952, the substance of the above mentioned and quoted form letter, along with excerpts from two publications concerning the matter, one dated 1848, A. Campbell's "Address on War" and 1945, Paul O. Nichols' "The Christian and Carnal Warfare," and the following explanation for Selective Service needs and information:

"In regard to selective service registrants:

"This body or fellowship has and is gaining recognition as to its unity regarding non-participation in carnal warfare. Each young man studies for himself the various aspects of the question, forms his own belief, and takes his own stand on his convictions. The church influences his position only in teaching and offering scriptural references for his personal study and then stands behind him wholeheartedly in encouragement and moral support"—C. Nelson Nichols.

Since the Congressional Record, May 7, 1952 and before that time many of the young men of this faith and fellowship have been mistreated and denied the

consideration due them through the Selective Service System's regulations and the Laws of the United States. In the past year the number of young men mistreated maliciously and arbitrarily by the Local SSS Boards (and often upheld by higher officials in the SSS) has increased and we feel that more must be said in defense of these young men who are willing to do all they can to upbuild the health and strength of this Nation as long as they are allowed to work through peaceable agencies and as long as they may be allowed to keep their civilian status and not offend their conscience by being made a part of an armed force.

This letter has assembled and set down together principles which should be known to all concerned. I, personally, desire to go on record in defense of these principles and in the defense of those sterling young men who are upholding these principles.

Sincerely,
C. NELSON NICHOLS
Minister—Church of Christ
849 Wilcox Ave.
Hollywood 38, Calif.

STATE OF SOUTH CAROLINA,
County of Greenville.

Affirmed and subscribed before me
this 12th day of November, 1952.

JOHN F. STRANGE
Notary Public for South Carolina.
My Commission expires at will of Gov.

Affidavit of Darnold B. McCord

November 14, 1952.

To Whom It May Concern:

As a minister of the Church of Christ for more than three years, I, the undersigned, make, to the best of my knowledge, this statement concerning the general position maintained by the church of Christ of my persuasion concerning carnal warfare, combatant and non-combatant.

First, be it understood, the church of Christ of my persuasion is not to be confused with some other religious bodies wearing the same appellative. In worship, organization and function, we are a fellowship distinct. Furthermore, be it understood that the said church of Christ is NOT a subversive fraternity, prating against civil government to the overthrow and/or the corruption of the same. The said organization is generally a pacific order in all of its endeavors. Its creed is the Bible; in brief, it earnestly and pacifically contends for a return of all religious peoples to the principles held by the church of the first century.

Since the Bible is the only creed of the said church of Christ, we have only the following to resort to in testimony of our position against carnal warfare—combatant and non-combatant:

(1). Our obligation to God is superior to all others (Matt. 22:37; Matt. 6:33; Acts 5:29).

(2). God forbids that His participate in carnal warfare (Jno. 18:36; Matt. 26:52).

(3). The weapons of our warfare are spiritual (2 Cor. 10; 3-4).

(4). We are to love our enemies—we can not do that and engage in carnal warfare (Matt. 5:44).

(5). To enter any branch of military service, combatant or non-combatant, we would be compelled to "swear" (take an oath), but the Bible forbids that we do so (Matt. 5:34).

(6). To serve in any way in the military service, we would be deprived of obeying the command to assemble on the first day of the week to worship with those of like faith; hence, we believe this would be in disobedience to God (Heb. 10:25; Acts 20:7; 1 Cor. 16:1-2).

Be it further understood that, according to the best of my knowledge, the fellow-ministers of my persuasion are united in their position regarding carnal warfare —combatant and non-combatant.

DARNOLD B. McCORD

Darnold B. McCord, Minister
church of Christ
552 North Wabash Avenue
Glendora, California.
and
General Delivery,
Ceres, California.

Subscribed and sworn to before me this 14th day of November, 1952.

TRINA McGARVEY,
Notary Public in and for the
County of Stanislaus, State of California.

Affidavit of James W. Russell

November 10, 1952

To Whom It May Concern:

I, James W. Russell, Evangelist of the Church of Christ, residing at 755 Orange Avenue, Fresno, California, labor with several congregations of the church, principally in central California. The congregations with which I labor in this area is a distinct fellowship, distinguished from others using the same name in that we are a "peace church". I have been an evangelist in this work since 1940 and have been using the facilities of radio broadcasting to preach the gospel for nearly four years. I am comparatively well known in an area which has a radius of about 100 miles.

The fellowship in which I am associated is not marred by alien political principles that might undermine the way of life known in this nation. We do NOT advocate the overthrow of our government. We, in our services, pray for our rulers and teach that this should be done by all disciples in this fellowship.

We are ever grateful for the privileges allowed us as conscientious objectors in this great nation and by firmly standing for the principles of peace and not donning the uniform of a soldier we are only exercising the privileges allowed us as citizens in this country. WE, IN THIS FELLOWSHIP ARE RELIGIOUS CONSCIENTIOUS OBJECTORS, not political objectors. We have no more right to push conscientious objection upon the nation than the nation does to push

military training and service upon the religious conscientious objector of the church of Christ. The Church of Christ was established by the Prince of Peace, given birth in peace, is the institution to which we are called in peace, bears peace as a fruit of the Spirit, and must grow and perpetuate itself by peaceful means. The weapons of carnal warfare cannot be borne by members of the Church of Christ or her members. We are not conscientious objectors to military legislation as long as that military legislation provides for and recognizes the conscientious objectors objections to military service and training.

JAMES W. RUSSELL, Evangelist
Church of Christ.

STATE OF CALIFORNIA,
County of Fresno.—ss.

On this 10th day of November, 1952, before me, the undersigned, A Notary Public in and for said County, personally appeared

Mr. James W. Russell

known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same

Witness my hand and official seal
(SEAL) D. E. PAULL
Notary Public in and for said County and State.
My Commission Expires Feb. 18, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 487

TED VERNON HEAD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 193-199) is reported at 199 F. 2d 337.

JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 1952. On October 23, 1952, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari until December 7, 1952, and on December 8, 1952, a petition was filed.[1] On

[1] December 7, 1952, fell on Sunday.

January 8, 1953, Mr. Justice Clark granted the Government's request for an extension of time for filing its response until February 9, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was a basis in fact for the action of the Selective Service System in classifying petitioner, a conscientious objector, 1-A-O (available for noncombatant military service only) rather than IV-E (opposed to both combatant and noncombatant training and service).

2. Whether the trial court erred: (a) in its instructions to the jury; (b) in failing to instruct the jury to disregard an allegedly improper argument made on behalf of the Government; and (c) in limiting the interrogation of witnesses by petitioner.

STATUTORY PROVISIONS INVOLVED

Section 6(j) of the Selective Service Act of 1948, 62 Stat. 604, 612-613, provides: [2]

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously

[2] As amended by Section 1(q) of the Universal Military Training and Service Act of June 19, 1951 (65 Stat. 75, 86, 50 U.S.C. App. (Supp. V), 456(j)), Section 6(j) of the Act of 1948 differs from the original provision in providing for civilian work of national importance instead of complete deferment for persons found to be opposed to both combatant and noncombatant service.

opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to

> noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Section 10(b)(3) of the Selective Service Act of 1948, 62 Stat. 604, 620,50 U.S.C. App. (Supp. V) § 460(b)(3) provides in pertinent part:

> Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. * * *

STATEMENT

On February 20, 1952, a one-count indictment was returned in the District Court for the Western District of Oklahoma charging petitioner with knowingly failing and refusing to submit to induction into the armed forces, in violation of the Uni-

versal Military Training and Service Act, 50 U.S.C. App. (Supp. V) 462 (R. 1-2). Following trial to a jury, petitioner was found guilty as charged and sentenced to three years' imprisonment (R. 4). On appeal, petitioner did not deny his refusal to submit to induction, but contended that his 1-A-O classification had no basis in fact, and that, accordingly, the trial court should have granted his motion for acquittal. The Court of Appeals for the Tenth Circuit unanimously affirmed the conviction, holding that there was a factual basis for the 1-A-O classification (R. 193-199).

The events preceding petitioner's classification and subsequent refusal to submit to induction are as follows:

On September 16, 1948, petitioner registered with his local board (R. 33). In his classification questionnaire, he did not sign Series XIV, Conscientious Objection to War, and on May 13, 1949, the local board classified him 1-A (available for military service) (R. 34-35). On October 31, 1950, he was notified to report for his physical examination (R. 36). On November 7, 1950, he requested a transfer from Oklahoma to California for physical examination (R. 36). Subsequently, on November 26, 1950, following his physical examination, he was notified that he had been found acceptable for induction into the armed services (R. 38). Meanwhile, however, on November 10, 1950, petitioner for the first time requested the special form for conscientious objectors (R. 37).

On the special form, which he filed with the local board on December 13, 1950, petitioner stated that by reason of his religious training and belief he was opposed to participation in war in any form, and, further, that he was conscientiously opposed to participation in noncombatant training or service in the armed forces. Accordingly, he claimed deferment as provided in § 6(j) of the Selective Service Act of 1948 (Gov. Ex. 2, R. 38). On January 4, 1951, the local board changed petitioner's classification from 1-A to 1-A-O (R. 39).

On January 10, 1951, without requesting the opportunity of a personal appearance before the local board,[3] petitioner perfected an appeal to the Appeal Board for the State of Oklahoma. On January 24, 1951, the Appeal Board determined that petitioner should not be classified in either 1-A-O or IV-E[4] (R. 40), and forwarded petitioner's file to the Department of Justice for an advisory recommendation (R. 41). The usual investigation of petitioner's character and reputation was made by the F.B.I., and an opportunity was afforded petitioner to appear before a hearing officer in

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[3] Selective Service Regulation § 1624.1 gives registrants the right to appear in person before the local board if a written request therefor is filed within ten days after Notice of Classification has been mailed. See 32 C.F.R. 1624.1 (1951 ed.).

[4] Class IV-E was the classification formerly provided by Selective Service Regulation for persons opposed to both combatant and noncombatant training and service. Class IV-E has since been superseded by Class 1-0, Conscientious Objector available for civilian work contributing to the maintenance of the national health, safety, or interest. See Selective Service Regulation § 1622.14 (32 C.F.R. 1622.14 (1951 ed.)).

Oklahoma City. This, petitioner failed to do. On June 27, 1951, the hearing officer recommended that petitioner be classified 1-A-O, and that, if he should be inducted into the land or naval forces, he be assigned to noncombatant duties (Gov. Ex. 6).[5] The Department of Justice, by a letter dated July 23, 1951, concurred in that recommendation, and on October 10, 1951, the state appeal board sustained the action of the local board in classifying petitioner 1-A-O (R. 43).

Petitioner's Selective Service file, which was before the appeal board at the time it affirmed the 1-A-O classification, contains the following pertinent facts:

(1) Petitioner, who in 1949 moved from Oklahoma to California and, in 1950, became a member of the Church of Christ at Waterford, California, answered questions 3 and 4 of the Special Form for Conscientious Objectors as follows (Gov. Ex. 4):

> 3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim * * *.
>
> How? By the teaching of the church. When? Since I have been a member of the church. From what source? From the preachers and teachers of the church.
>
> 4. Give the name and present address of the

---

[5] The report of the hearing officer, which is part of Gov. Ex. 6 (see R. 46-47), is reprinted as an appendix to this brief, *infra*, pp. 16-22.

individual upon whom you rely most for religious guidance.

J. F. Thomasson, Waterford, California.

(2) The report of the hearing officer, in summarizing the findings of the F.B.I. investigation, stated that a minister of the Church of Christ at Waterford had advised that:

> * * * the teachings of the church are not to engage in carnal warfare which means the bearing of arms in time of war and the killing of other people; that all of the Churches of Christ do not subscribe to this same teaching and it is a matter to be handled by each church; *that the church had no objection to a member engaging in medical corps work* * * *. [Emphasis supplied.]

The hearing officer noted further that, while many persons had testified as to the registrant's sincerity, good reputation, and strong religious beliefs, he had never given public expression to his beliefs concerning participation in war. In concluding, the hearing officer remarked that a better understanding of petitioner's position might have been obtained if he had appeared personally. (Gov. Ex. 6, see Appendix, *infra,* p. 21).

On December 4, 1951, petitioner reported to the Induction Center at Oklahoma City, but refused to be inducted into the armed services (R. 70).

ARGUMENT

Petitioner admitted wilfully refusing to submit to induction into the armed forces (R. 121). His only defense at the trial was that he had been classified as available for non-combatant service (Class 1-A-O) without any proper basis in his Selective Service file. In his petition for a writ of certiorari, petitioner, in effect, renews his claim that he was improperly classified by the Selective Service System (Pet. 15, 18, 21, 22),[6] and, in addition, alleges that errors in the trial court prejudiced his efforts to establish this defense at the trial (Pet. 10, 11, 13). There is no merit in these contentions.

(1) This Court held in *Cox* v. *United States,* 332 U.S. 442, and *Estep* v. *United States,* 327 U.S. 114, that the scope of judicial review of Selective Service System classifications is strictly limited.

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[6] Petitioner refers to the failure of the trial court to make a finding as to the existence of any basis in the file (Pet. 15), but this is not now presented as an independent source of error. While, as this Court has said, the question whether there is any basis in fact for the given classification is properly one for the judge, *Cox* v. *United States,* 332 U.S. 442, 453, it does not follow that petitioner was prejudiced in any way by its submission to the jury. In the instant case, as the Court of Appeals pointed out, the trial court did deny petitioner's motion for a directed verdict based on the ground that there was no basis in fact to justify the 1-A-0 classification given by the local board. Moreover, counsel for petitioner by his tendered instruction No. 2 (R. 170-171) in effect requested the court to submit to the jury the question whether or not the board had acted without evidentiary basis in the file.

In *Cox* v. *United States, supra,* it was said (332 U. S. at 453):

> * * * when a court finds a basis in the file for the board's action that action is conclusive. The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of the guilt of the accused for disobedience of orders.

Classifications founded upon a basis in fact "are final even though they may be erroneous." *Estep* v. *United States, supra,* at 122.

The present case falls within the scope of the *Cox* and *Estep* cases. There is a "basis in the file" in that the Report of the Hearing Officer, which was before the appeal board, set forth that a minister of the Church of Christ at Waterford [7] had indicated that the church did not object to a member's engaging in medical corps work (Gov. Ex. 6, Appendix, *infra,* p. 20). While the local board did not have this information at the time it made its initial 1-A-O classification, the statement was received prior to the time the Department of Justice made its advisory recommendation and was included in the record upon which the final decision of the state appeal board was based (R. 46).

Petitioner now, for the first time, submits affidavits tending to show that the statement attributed to Thomasson did not truly represent his views or those of his church (see Pet. 21-22, Ap-

[7] This, presumably, was Thomasson, the minister named by petitioner as the person he relied upon for religious guidance.

pendix B. pp. 4-14), and petitioner argues, further, that even if it did, he would not be bound by the beliefs of his religious leader (Pet. 22). Whether or not there is any merit in these contentions, this is not the time to consider them. Petitioner made no attempt to present his views before the local board following his initial 1-A-O classification and, thereafter, did not appear personally or present evidence before a Department of Justice Hearing Officer, although given an opportunity to do so. Having failed to take advantage of the procedure specifically afforded by Congress, petitioner can not now seek to raise what should properly have been raised at the administrative hearing. See *United States* v. *Morton Salt Co.*, 338 U. S. 632, 653-654; *Lichter* v. *United States*, 334 U. S. 742, 791-793.

(2) Petitioner's objections based on the alleged trial errors are without merit.

(a) In its first instruction to the jury, the court correctly instructed the jury that the registrant should be placed in the lowest class for which he is determined to be eligible, and that Class IV-E was lower in rank than 1-A-O, the classification ultimately given (R. 144-145). Later, at the close of Instruction No. 8, the court stated that although the facts contained in the file might justify a IV-E classification, the board had the right to grant a 1-A-O classification "if it felt under the facts that the defendant should be [so] classified" (R. 152). While this single sentence, which is now cited as erroneous by petitioner, is supposedly misleading,

the instructions when read as a whole can not be held objectionable. As the Court of Appeals observed, "The jury were clearly told that the local board was required to base its findings on evidence in the file and to act in accordance with the Act and the regulations and standards therein prescribed."

Furthermore, since no objection was made to the sentence now alleged to be erroneous, either at the time it was given or subsequently, the alleged error can not be considered on appeal. *Connelly* v. *United States,* 79 F. 2d 373 (C. A. 3); *Muench* v. *United States,* 96 F. 2d 332 (C. A. 8). In view of the court's apparent readiness to correct other errors brought to its attention (see R. 153-157), it seems certain that had this asserted discrepancy been called to its attention, steps would have been taken to clarify the matter.

(b) At the close of his argument to the jury, counsel for the government stated (R. 139):

> Gentlemen, after the proof you have heard * * * if you come in with a verdict of not guilty I guarantee you no other draft board would come up here and tell you they haven't had but one. They will have nothing but pretended conscientious objectors . . .

Counsel for petitioner asked that the jury be instructed to disregard this remark, and the court responded (R. 139):

> Well, the jury is supposed to have good common sense and they can exercise it.

While at the time counsel for petitioner thanked the court for having given this admonition, he now claims that the impropriety was not adequately remedied. We submit that the court's remark strongly implied that the statement in question should be disregarded. In any event, it is inconceivable that this single questionable incident in a carefully conducted trial could have substantially influenced the jury, so that, if error, it was not of such seriousness as to "affect substantial rights" of petitioner. See Rule 52(a), F. R. Crim. P.; *United States* v. *Cohen,* 177 F. 2d 523 (C.A. 2), certiorari denied, 339 U. S. 914, rehearing denied, 339 U. S. 936.

(c) Finally, petitioner was not precluded from presenting evidence tending to show the lack of a basis in fact for his 1-A-O classification (Pet. 13). The first instance of allegedly improper limitation of direct examination involved an attempt to question the clerk of the board concerning substantive matters clearly beyond her competence (R. 63). The second and third such instances referred to in the petition involved attempts by counsel to question a member of the local board concerning the content of petitioner's Selective Service file (R. 75-76). It was apparent to the court, after questioning covering several pages in the record, that the witness had no recollection of its contents. Petitioner fails to disclose that the court, after stopping the questioning, stated that the witness should review the file during the noon recess, after which further interrogation would be permitted. The

fourth instance occurred after counsel had previously attempted without success to elicit from a member of the local board the admission that the board had considered the fact that a IV-E classification meant complete exemption from military or civilian duties (R. 99). This line of inquiry was clearly proceeding nowhere at the time it was terminated, and, moreover, was of doubtful relevance on the issue of whether or not there was a factual basis in the file for the board's action. The final instance related to an attempt to introduce a conversation which a defense witness had had with the clerk of the board (R. 111). Objection to this was properly sustained since the testimony could have revealed no more than the witness' recollection of the clerk's opinion as to the practices and attitudes of the board.

In this case, the sole question in issue was whether there was a basis in the file for sustaining the board's action. On that question the file, itself, was the best evidence, and it was before the court and the jury (R. 47).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER J. CUMMINGS, JR.,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
HOWARD ADLER, JR.,
Attorneys.

FEBRUARY 1953.

APPENDIX[8]

Report of Hearing Conducted by the Department of Justice Pursuant to the Selective Service and Training Act of 1948

Preliminary Statement

Name and Address of Registrant:

Ted Vernon Head, Jr.
1940 Bishop Avenue
Stockton, California

Questionnaires Filed:

SSS Form No. 100 filed—Not shown
SSS Form No. 150 filed December 13, 1950

Nature of Claim for Exemption:

From both combatant and noncombatant military service.

Action by Local Board:

January 4, 1951 classified I-A-O

Action by Board of Appeal:

Appeal Board for the State of Oklahoma determined registrant should not be classified in

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[8] The report of the hearing officer, printed herein as an appendix, was introduced at the trial as part of petitioner's Selective Service file, Gov't Exh. 6 (R. 46-47). However, it was not included in the exhibits certified to this Court by the clerk for the Court of Appeals for the Tenth Circuit. The United States Attorney also was unable to locate the documents actually used at the trial, but upon our request forwarded to us a signed carbon copy of the hearing officer's report.

either Class I-A-O or Class IV-E under the circumstances set forth in sub-paragraphs (2) and (4) of paragraph (a) of Section 1626.25 of the Selective Service Regulations, and therefore forwarded registrant's file to the Department of Justice for an advisory recommendation pertaining to said conscientious objection claim.

DATE FILE RECEIVED BY THE DEPARTMENT OF JUSTICE:

March 9, 1951

DATE FILE INCLUDING INVESTIGATIVE REPORT OF FEDERAL BUREAU OF INVESTIGATION RECEIVED BY HEARING OFFICER:

May 15, 1951

DATE OF GIVING NOTICE OF HEARING:

May 15, 1951

HEARING HELD PURSUANT TO NOTICE:

Hearing held June 2, 1951, at ten o'clock A.M. in 404 Fidelity National Bank Building, Oklahoma City, Oklahoma. Registrant was not personally present, but mailed many statements.

STATEMENT OF FACTS

1. Your hearing officer reviewed the entire file but was unable to interrogate registrant as he did not appear personally at the hearing.

2. The file reflects that this registrant was born at Lawton, Oklahoma, July 19, 1929; that he com-

pleted 11 years of elementary school and four years of junior high school and two years of high school, and that he is not married; that he had worked on Saturdays at the Lawton Produce delivering chickens; that he had been doing this one year, but did not expect to continue in this work.

3. His SSS Form 150 reflects registrant believes in a Supreme Being.

Describing the nature of his belief which is the basis of his claim he says, "My belief is based upon the Bible, and I believe its tenets are against war in any form. Yes, my belief in a Supreme Being involves duties which are superior to those arising from any human relation".

Explaining the source of his training, he says: "How? By the teachings of the church. When? Since I have been a member of the church. From what source? From the preachers and teachers of the church."

He relies for religious guidance upon T. F. Thomasson, Waterford, California.

He believes in the use of force "under no circumstances".

Describing the actions and behavior in his life most conspicuously demonstrating the consistency and depth of his religious convictions, he says: "Devoted attendance at the services of the church. I do not drink, smoke, dance or attend public amusement places. My convictions are so deep in this regard, that I do not let my family or fellow workers interfere, even though they try".

He has never given public expression as to his beliefs.

His parents are Ted Vernon, Sr. and Clara H.

Head, 1709 Baldwin, Lawton, Oklahoma, each of whom were reared in the Catholic Church.

Registrant is a member of the Church of Christ, having become a member "by faith, repentance, confession of Christ and immersion" in March, 1950 at Waterford, California.

Describing the creed of his religious sect or organization, he says: "the creed of the church of Christ is the Bible. The following is from that source. Jesus commanded 'put up thy sword' (Matt. 26:48-52) Jesus said, 'Love your enemies' (Matt. 5:45-48) Paul said, 'avenge not yourselves; vengeance belongeth to God' (Rom. 12:19-21); Paul further said, 'The weapons of our warfare are not carnal' (2 Cor. 10:3-5) and 'we wrestle not against flesh and blood' (Eph 6-10:17)".

He gives as references, M. F. Barker, Grocery, Gen. Del. Waterford, California; Jim Massengale, Contractor, Hickman, California; Roy Arnett, Farmer, Route 1 Box 412 Waterford, California; and Darnold B. McCord, Evangelist, 552 North Wabash, Glendora, California.

4. Investigation of the Federal Bureau of Investigation shows at Yakima, Washington, reference interviewed and advised registrant in his opinion sincere in belief of Church of Christ and the viewpoint of church regarding entering the Armed Forces.

Employers and acquaintances of registrant at Lawton, Oklahoma regard him as being of good character and reputation, but know little about his religious activities or beliefs; a band instructor in the Lawton High School advised registrant played in the band; that he was an average student, par-

ticipated in initiations which were rather severe; that the registrant at no time discussed his religious beliefs.

An employer at Lawton, Oklahoma advised he was a good, willing worker, appeared to be honest and of good character; knew nothing regarding registrant's religious beliefs.

A check with two Church of Christ Ministers at Lawton, Oklahoma revealed registrant is not a member of either church.

There is no police record at Lawton, Oklahoma.

At Waterford, California, a minister of the Church of Christ advised the teachings of the church are not to engage in carnal warfare which means the bearing of arms in time of war and the killing of other people; that all of the Churches of Christ do not subscribe to this same teaching and it is a matter to be handled by each church; that the church had no objection to a member engaging in medical corps work; that registrant joined the church in March, 1950, and had since that time attended church regularly; that he does not drink or smoke, and follows the teachings of the church.

A groceryman, a member of the Church of Christ, believes registrant is conscientious in his objection to military service.

No record at the Sheriff's office or Retailers Credit Association at Modesto, California.

At Stockton, California, a witness who lives across the street from the brother-in-law of subject, advises he has seen nothing which would indicate that registrant has strong religious beliefs.

Neighbors at Stockton, California are unable to

give any information concerning registrant's religious beliefs.

An employer advised registrant had worked for the company as a laborer; that he did not know the subject personally but understood he bore the nickname of "the preacher" among fellow workers in his plant.

The foreman of a company for whom registrant worked advised that he had noticed registrant reading the Bible during his lunch period, and that he appeared sincerely interested in his religion.

Conclusion

After a review of all of the statements contained and shown in the file, and the various instruments furnished by the registrant many of which had no bearing on the issues involved in this case, and while the evidence in this case points to a very commendable way of living on the part of registrant, yet it is the conclusion of your hearing officer that the conscientious objections of the registrant did not come about until after the registrant had registered, and his activities in his church increased at once. It is possible that if the registrant had seen fit to appear personally a better understanding of his position could be had, but your hearing officer from the evidence before him, is not convinced that he is entitled to a IV-E classification, but that he should be classified I-A-O.

Recommendation

It is, therefore the recommendation of your hearing officer that the conscientious objection of the registrant to combatant military service be

sustained and that he be classified in Class I-A-O and if inducted into the land or naval forces that he be assigned to non-combatant duties as defined by the President.

(S.) R. A. BELISLE,
Hearing Officer,
404 Fidelity National Bank Building,
Oklahoma City, Oklahoma.

DATED JUNE 27, 1951.

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